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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 385–393) is reported at 338 F. 2d 12. The opinion of the district court (R. 354–368) is reported at 224 F. Supp. 129.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1964 (R. 394–397). On November 27, 1964, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including January 5, 1965. The petition was

filed on January 4, 1965, and was granted on April 5, 1965 (R. 400). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the materials at issue are "obscene, lewd, lascivious, indecent, filthy or vile" within the meaning of 18 U.S.C. 1461.

2. Whether procedural defects affect the judgment.

STATUTE INVOLVED

18 U.S.C. 1461 provides, in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
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> * * * * *
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> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; * * *
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> * * * * *
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> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
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> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or dis-

posing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

Having waived trial by jury (R. 2), petitioners were tried and convicted of violating 18 U.S.C. 1461. Petitioner Documentary Books, Inc., was convicted on six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" book (*The Housewife's Handbook on Selective Promiscuity,* hereinafter called *The Handbook*) and three counts of having caused the mailing of advertisements telling where the book could be obtained. Petitioner Liaison News Letter, Inc., was convicted on six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" pamphlet (*Liaison,* Vol. 1, No. 1) and three counts of having caused the mailing of advertisements telling where the pamphlet could be obtained. Petitioner Eros Magazine, Inc., was convicted of six counts of having caused the mailing of an "obscene, lewd, lascivious, indecent, filthy or vile" magazine (*Eros,* Vol. 1, No. 4) and four counts of having caused the mailing of advertisements telling where the magazine could be obtained. Petitioner Ginzburg was convicted of all twenty-eight of the foregoing counts (R. 2–3, 345). Petitioner Eros Magazine, Inc., was fined a total of $5,000, and each of the other corporate petitioners a total of $4,500.

Petitioner Ginzburg was fined a total of $28,000 ($1,000 on each count) and sentenced to a total of five years' imprisonment. Three years of his sentence was based upon counts involving *The Handbook* and two years upon counts involving *Eros* (R. 4–5, 373–379). No prison sentence was imposed on counts involving *Liaison*.

In its direct case, the government introduced the allegedly offensive materials themselves and, in addition, offered testimony that unsuccessful efforts had been made to obtain for *Eros* the postmarks of Blue Ball, Pennsylvania, and Intercourse, Pennsylvania (R. 152–159), and that a postmark was obtained for all three publications at Middlesex, New Jersey (R. 159–162). The government also offered a witness who had been an employee of *Liaison*, who testified concerning the manner in which that publication had been written and compiled (R. 173–183). Petitioners offered various witnesses (a psychologist, a psychiatrist, a literary critic, an art critic, and a minister trained and experienced in clinical psychology) who testified that the three works do not appeal to prurient interest, have literary, artistic or scientific value, and do not go substantially beyond community standards of candor (R. 186–223, 227–241, 256–316). In addition, they offered testimony by the author of *The Handbook* as to its factual character, her purpose in writing it, and her own prior mailing of copies of it (R. 223–227). They also offered a number of books and magazines, including some admittedly obscene materials, for purposes of comparison (R. 196–198, 242–256). On rebuttal, the government offered three witnesses who testified con-

cerning the character of the materials in issue (R. 333–334).

The verdict of guilty was entered on June 14, 1963 (R. 2). On August 6, 1963, the court, at petitioners' request (R. 349), filed special findings of fact (R. 3, 351), and on November 21, 1963, the court filed an opinion denying petitioners' motion in arrest of judgment or for new trial (R. 354–368). With regard to the character of the three publications [1] the court's opinion described them as follows (R. 361–367):

LIAISON

> *Liaison* is a newsletter or periodical folder type of publication consisting of commentary from various sources with a general editorial treatment. * * * The material covers the most perverse and offensive human behavior. While the treatment is largely superficial, it is presented entirely without restraint of any kind. * * * [I]t is entirely without literary merit. * * * If there is any socially redeeming value in this material it must come from what is advocated or from its entertainment value. There are jokes and rhymes which clearly go beyond contemporary community standards of humor, even in applying liberal night club standards. The remainder of the material is of the same nature and exceeds the standard in the same manner.
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> * * * * *

[1] It was stipulated that petitioners caused the mailing of the three works and of the advertisements pertaining to them with knowledge of the contents of the works and the advertisements (R. 148–150).

* * * Liaison is designated obviously and solely for the purpose of appealing to the prurient interest of an ordinary person. The only idea advocated is complete abandon of any restraint with regard to any form of sexual expression. This "idea" is nothing more than could be advocated by the most flagrant pornography * * *.

EROS

Eros is a carefully contrived magazine or periodical type of publication with a hard cover and glossy paper. It is replete with photographs and includes reproductions of recognized works of art. Nevertheless, * * * the dominant appeal is to pruriency. The works of art * * * are merely a facade to disguise and protect the basic purpose and effect of the entire work. * * *

Although it is difficult to classify all of the articles in Eros into specific categories, there is a clearly defined arrangement to the material. To some, several articles might be considered innocuous, only slightly erotic and possibly not obscene in and of themselves. * * * This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. * * * [S]ince the work must be considered as a whole, material which might be innocuous alone partakes of the obscenity elsewhere in Eros and becomes part and parcel of the overall plan and intent of the work. * * *

* * * The items of possible merit and those items which might be considered innocuous are a mere disguise to avoid the law and in large measure enhance the pruriency of the entire work. The only overriding theme in Eros is

the advocacy of complete sexual expression of whatever sort and manner. * * *

* * * The articles called: "Frank Harris, His Life and Loves" including "My Life and Loves" by Frank Harris; "Bawdy Limericks" and the "Natural Superiority of Women as Erotocists" and "Black and White in Color" are such that standing alone, one has little difficulty in finding all of the requisite elements of obscenity. For example: "Bawdy Limericks" consists of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior. Also by way of example: the series of pictures, "Black and White in Color", constitutes a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination. * * *

* * * There is no notable distinction between the aforesaid, taking each one as a whole, and the admittedly obscene material which was in evidence for comparison purposes.

The impact of these articles and items is sufficient to permeate the entire volume of Eros. * * *

THE HANDBOOK

* * * This book is of a kind with * * * admittedly hardcore pornography. It is an explicit decription [sic] of a woman's sexual experiences from early childhood and thereafter throughout most of her life. It purports to be, and the authoress so stated under oath, a factual and highly accurate reporting of actual occurrences. * * * We doubt the accuracy of this book. It also easily meets the previously

> mentioned tests of bizarre exaggeration, morbidness and offensiveness.
>
> The Handbook's description of various sexual acts is astounding. As in the case of Liaison, no literary merit its ascribed to the book. Its sole claim to redeeming value is its alleged value as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. Any testimony to this effect is expressly disbelieved by this Court. * * *
>
> The Handbook, standing bare of any socially redeeming value, is a patent offense to the most liberal morality. The descriptions leave nothing to the imagination, and in detail, in a clearly prurient manner offend, degrade and sicken anyone however healthy his mind was before exposure to this material. It is gross shock to the mind and chore to read. Pruriency and disgust coalesce here creating a perfect example of hardcore pornography.

In his findings, the judge concluded that each publication "treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader"; and "has not the slightest redeeming social, artistic or literary importance or value" (R. 352–353). As to *Eros* and *The Handbook,* the judge found that each "appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 352–353). As to *The Handbook* and *Liaison,* the judge concluded, in addition, that each "goes beyond customary limits of candor, exceeding contemporary standards in description and representa-

tion of the matter described therein"; and that each "is patently offensive on its face" (R. 352–353). As to *Liaison,* the judge found that it was "published for the purpose of appealing to the prurient interest of the average individual" and that it "primarily and as a whole is a shameful and morbid exploitation of sex" (R. 352). In conclusion, the court found that all three works "are devoid of theme or ideas" and "are all dirt for dirt's sake and dirt for money's sake" (R. 353).

The court of appeals affirmed (R. 385–397). After noting that "[w]e have read, examined and considered the publications involved in this appeal, '* * * in the light of the record made in the trial court * * *'" (R. 387), the court found, (1) as to *Eros,* "its basic material predominantly appeals to prurient interest; it is on its face offensive to present day national community standards, and it has no artistic or social value" (R. 389–390); (2) as to *The Handbook,* "[t]here is nothing of any social importance in [it]. It is patently offensive to current national community standards. Applying those standards to the average person its dominant theme as a whole appeals to prurient interest" (R. 390); and (3) as to *Liaison,* "[i]ts material openly offends current national community standards in much the same fashion as does *Eros.* Taken as a whole, its appeal is directed to the prurient interest of the average person in the national community. * * * There is no pretension that it has any social significance or literary merit" (R. 390–391). The court emphasized that these conclusions were "independently arrived at" (R. 393). Finally,

the court rejected six procedural errors which petitioners alleged as affecting their convictions (R. 391–393).[2]

ARGUMENT

Introduction and Summary

In *Roth* v. *United States*, 354 U.S. 476, 485, this Court held that "obscenity"—*i.e.*, material dominantly prurient and offensive in light of community standards—"is not within the area of constitutionally protected speech or press." As the Court's opinion shows, this holding flowed principally from constitutional history, including evidence contemporaneous with the adoption of the First Amendment, demonstrating "the rejection of obscenity as utterly without redeeming social importance" and, hence, treating it as matter "outside the protection intended for speech and press." The constitutional protection "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired

[2] The six alleged errors were as follows: (1) that the trial court failed to make the requisite factual findings with regard to *Eros* and *Liaison;* (2) that the Special Findings of Fact under Rule 23(a) of the Federal Rules of Criminal Procedure were not filed promptly; (3) that the trial court improperly used evidence of criminal intent relevant only against Eros Magazine, Inc., against all defendants; (4) that the testimony of government rebuttal witness Frignito was improper; (5) that the trial judge had improperly denied the motion to dismiss the indictment without having read the allegedly obscene publications in their entirety; and (6) that the trial court had erred in striking the affidavit and exhibits in support of the defense motion to dismiss the indictment. (R. 391–393.) Insofar as these allegations are raised in this Court, they are discussed at pp. 34–36, *infra*, and in footnote 6, p. 22–23, *infra*.

by the people"; the Court found that obscenity, unrelated to such an exposition of ideas, had never been thought to be within its scope. Thus, "this Court has always assumed that obscenity is not protected by the freedoms of speech and press." The Court's view was, moreover, buttressed by "the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (354 U.S. at 481, 483–485.)

In the present case, petitioners do not challenge the holding of *Roth* that some utterances may thus be deemed "obscene" and therefore outside the speech and press protections of the First Amendment. They also accept the general proposition that the test of obscenity is whether the publication is dominantly composed of prurient and offensive material and is without redeeming social importance. Petitioners argue, however, that all three publications involved in this case—*Liaison, The Handbook* and *Eros*—do, indeed, have redeeming importance and that, in addition, the trial court and the court of appeals disregarded both the evidence and the particular legal standards appropriate in judging the value, pruriency, and offensiveness of these materials (Pet. Br. 28–56). Petitioners also urge certain procedural errors as affecting the validity of their convictions (*id.* at 57–66).

Two briefs filed with the Court *amicus curiae* urge, in addition, that *Roth* be overruled. The brief of the Authors League of America, Inc., argues (p. 5) that a criminal obscenity statute may not be applied, as it was both in *Roth* and in this case, "where a book or

other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the right of privacy of individual citizens"; the brief of the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania urges (p. 4) that "[a]ll utterances"—including obscenity—"are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger [apparently deemed lacking by this *amicus* in cases of obscene publications] that they will bring about a substantive evil to society unless restrained."

We think it appropriate to respond, albeit briefly in light of the full consideration recently given to the question by the Court in *Roth,* to the suggestions of the *amici* that *Roth* v. *United States* be overruled and the federal mail-obscenity statute (18 U.S.C. 1461) be held unconstitutional even as applied to concededly obscene material with no redeeming importance. We do so in the first section of this brief. We then show that both courts below unquestionably applied the proper legal standards laid down by this Court in *Roth* in judging whether the materials in this case were obscene. We submit further that the conclusions of the courts below that the particular materials here involved were dominantly prurient and offensive and without redeeming importance were reasonable in light of the character of these materials. If, upon an independent view of the materials, the Court finds that these materials indeed had no redeeming features placing them within the protection of the First Amendment, we submit that the findings of obscenity should be affirmed. Finally, we address ourselves to

the procedural errors urged by petitioners and submit that they present no ground for setting aside the convictions.

I

THERE IS NO OCCASION TO REEXAMINE THE HOLDING OF *ROTH* V. *UNITED STATES* THAT THERE IS A CLASS OF OBSCENE UTTERANCES, WITHOUT REDEEMING IMPORTANCE OR SOCIAL VALUE, WHICH IS OUTSIDE THE PROTECTIONS OF THE FIRST AMENDMENT

Roth held that "obscenity is not within the area of constitutionally protected speech or press" (354 U.S. at 485). It based this judgment upon a consensus—reflected in the laws of all the States, in federal statutes since the middle of the last century, in the uniform decisions of this Court and in the understanding of the Framers—that a class of filthy or lewd utterances exists which, because of their offensiveness and lack of social importance, may and should be regulated consistently with constitutional guarantees of freedom of speech and press. In the view of this consensus such utterances play no role in the interchange of ideas toward which the constitutional protections were directed; in light of the purposes of the First Amendment they are "utterly without redeeming social importance" and hence outside the scope of that Amendment in light of the strong social policies favoring their prohibition. *Roth* declined to overturn this established uniform doctrine and practice.

There is, in our view, no occasion to reexamine this holding. We believe that there continues to be a solid basis for the decision in *Roth* that obscene utterances

exist which, while they take the *form* of protected speech, bear no relationship, or so little relationship, to the flow and exchange of ideas which the Constitution safeguards that recognition may and should be given to a long-standing practice excluding them from constitutional protection in light of their offensive quality. In *Roth,* where the question of constitutionality was squarely raised by the parties, the United States lodged with the Court numerous examples of such material; similar material was placed in the record of this case by petitioners for purposes of comparison (R. 196–198), petitioners conceding that it was within the statute. Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material, we submit, is solely for the purpose of arousing lust; it cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. In addition, as this Court has held (*United States* v. *Limehouse,* 285 U.S. 424), the concept of obscenity under 18 U.S.C. 1461 similarly applies to vulgar and filthy, rather than purely erotic, sexual material—and perhaps

to filthy scatological material as well [3]—used solely to arouse or offend and with no other purpose or context. If no rational basis existed for prohibiting these materials the First Amendment might protect them, despite their total lack of redeeming importance, because of the dangers inherent in the difficult process of distinguishing these worthless materials from protected speech. We submit, however, that so long as a substantial social purpose may reasonably be deemed served by suppressing these materials, *Roth* correctly held that, lacking redeeming importance, they are not constitutionally privileged.

We note briefly several substantial bases upon which society grounds its prohibition of these and similar materials. As the American Law Institute noted in incorporating a prohibition of obscenity as part of its recommended Model Penal Code, there is reason to believe that obscene materials constitute a source of tension and disturbance through the creation of deep-seated feelings of shame and morbidity in persons exposed to them (A.L.I. Model Penal Code, § 207.10, Tentative Draft No. 6, pp. 5, *et seq.*). Obscenity statutes also undoubtedly constitute an attempt to preserve and maintain public morality, not unrelated to similar legislation prohibiting polygamy, public nudity, prostitution, gambling and narcotics. (See Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Col. L. Rev. 391). In addition, although opinion is sharply divided on the question, some substantial view exists that the distribution of obscenity is more or less directly related to the commission of anti-

[3] See A.L.I. Model Penal Code, Proposed Official Draft (1962) § 251.4.

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social acts by at least some of its recipients. The prohibition of obscenity on these, and perhaps other, grounds is neither recent nor unique. *Roth* itself notes the long-standing and almost universal condemnation of such material in this and other countries.

The federal obscenity statutes play a limited and supplementary role in the scheme of regulation thus permitted by *Roth*. The decision whether, and to what extent, to regulate obscenity within the constitutionally permissible area is primarily for the States, and virtually all States exercise the power to some degree.[4] Federal statutes are supplementary—"to control what the States cannot" (*Hoke* v. *United States,* 227 U.S. 308, 321). Federal power is thus used to prevent the almost total evasion of State regulation which might result from the use of interstate facilities, immune from State control, to distribute material prohibited in all, or almost all, localities. See *Brooks* v. *United States,* 267 U.S. 432, 436; *Lottery Case,* 188 U.S. 321, 357. For this reason, the federal statutes incorporate national standards of pruriency, offensiveness and redeeming value and they are not properly invoked unless a wide national consensus exists that the material should be prohibited and is without redeeming value.

Amici appear not to challenge directly the proposition that some obscene material bears so little rela-

[4] *Roth* noted that, in 1957, all 48 States had obscenity prohibitions, 354 U.S. at 485 n. 16, and we are not aware that any of these have been repealed in the years since *Roth*. We have found no obscenity statute in Hawaii. Alaska Statutes, 11.40. 160, however, makes it unlawful, *inter alia*, knowingly to distribute a "sexually indecent comic book."

tionship to the protected areas of free speech and free press that it may be regulated by federal statutes in light of its universally recognized offensiveness. They do, however, suggest that the imprecision of the standard for determining what is thus obscene, and the difficulty of applying any standard to borderline cases, has a repressive or deterrent effect upon the dissemination of some questionable material which merits First Amendment protection, and that this effect is sufficient reason for holding all obscenity regulation invalid. The argument that the standard of obscenity is too imprecise "to withstand the charge of constitutional infirmity" (354 U.S. at 489) was raised and rejected in *Roth*. It seems fair to observe, in addition, that the fears of undue repression of questionable material as a result of the *Roth* holding are simply not borne out. The years since *Roth* have seen numerous examples of widespread distribution of material previously thought to be clearly within the prohibited area, as well as a growing frankness regarding the public discussion of sexual subjects. These materials include not only well known "pornographic" books such as *Tropic of Cancer,* but a proliferation of erotically oriented magazines and pocket novels offensive to substantial segments of the community and of relatively little, if any, redeeming value. In view of this experience, *Roth* has clearly not operated as an instrument of repression.

In sum, and as petitioners assume for purposes of their own attacks upon the convictions here, there is no occasion at this time to reexamine the holding of

Roth that the First Amendment does not invalidate federal statutes regulating the distribution of obscene material which is dominantly prurient and offensive and has no redeeming social importance. We turn now to the question whether the trial court and the court of appeals applied the correct standards for determining whether the materials here at issue were obscene.

II

THE COURTS BELOW APPLIED THE PROPER STANDARDS IN DETERMINING THE MATERIALS IN THIS CASE TO BE OBSCENE

The test of obscenity adopted by the Court in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). See, also, *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 482, 486 (opinion of Mr. Justice Harlan and Mr. Justice Stewart), and *Jacobellis* v. *Ohio,* 378 U.S. 184, 191–192 (opinion of Mr. Justice Brennan and Mr. Justice Goldberg). The courts below unquestionably applied this test, as their findings, summarized in the Statement, *supra,* pp. 5–9, show. We submit that, in addition, their definitions of the various elements of the test were clearly correct.

In order to give meaning to the term "prurient interest" the courts below invoked the definition set out in the *Roth* opinion (354 U.S. at 487, n. 20) as well as the definitions of obscenity which appear in the cases cited in that opinion (354 U.S. at 489, n. 26). They correctly ruled that the relevant question in this regard was whether the dominant theme and appeal of

each publication would be a morbid and shameful preoccupation with sex, as opposed to a healthy sexual interest, and they found that it would. Thus, as to *Eros* and *The Handbook,* the trial judge found that each "appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner" (R. 352–353). As to *Liaison,* the judge found that it was published "for the purpose of appealing to the prurient interest of the average individual" and that it "primarily and as a whole is a shameful and morbid exploitation of sex" (R. 352). In addition, the judge found that each publication "creates a sense of shock, disgust and shame in the average adult reader" (R. 352–353). The court of appeals made similar findings after an independent examination of the materials (R. 387–391).

Both courts below thus properly understood that the dissemination of an utterance lacking in social importance is forbidden under the federal statute only if its dominant theme constitutes an appeal to morbid and shameful prurient interest; as they recognized, the statute does not purport to suppress all worthless utterances. Both courts also properly and explicitly understood that, at least in a case like this one where the material was not aimed at a special audience with perverse or unusual sexual interests, the question was its impact upon the "average adult reader." Thus neither court viewed the material in light of its effect upon "particularly susceptible persons," which *Roth* held to be improper (354 U.S. at 489); and each also viewed the publications "as a whole" as *Roth* requires (*ibid*). That is, parts of a unitary work, like *The*

Handbook, may not be taken out of context and judged separately in determining obscenity. On the other hand, we believe that the trial judge correctly focused upon individual articles in judging the obscenity of *Liaison* and *Eros,* which are collections of individual pieces tied together only by the fact that all deal with erotic or sexual subjects. Although such anthologies must also be viewed "as a whole," that does not mean that the distribution of independent obscene works becomes privileged if sandwiched between non-obscene works to which they bear no integral relationship.[5]

Each court further understood that the question of obscenity must be decided by reference to the general standards of the national community, not in terms of predilections or special values restricted to particular localities; the court of appeals stressed, as to each publication, that it offended "national community standards" (R. 389–391). The courts below also clearly understood that a work cannot be considered obscene unless it is offensive in the sense that it goes substantially beyond national standards of permissible candor. The trial judge explicitly found *Liaison* and *The Handbook* each "patently offensive on its face" (R. 352–353), and his discussion of *Eros* (R. 362–366; Statement, *supra,* pp. 6–7) shows that he also deemed it offensive. The court of appeals found all three works "offensive" in light "of national standards" (R. 389–391).

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[5] See *Collier* v. *United States*, 283 R. 2d 780, 782 (C.A. 4) ("a person who mails a picture or pictures obviously obscene does not escape the condemnation of the statute by placing

Having found that each publication in issue met the tests of pruriency and offensiveness, the courts below also separately inquired, as an additional safeguard, whether the materials nevertheless had any "redeeming social importance" (354 U.S. at 484). If such redeeming importance had been found, the First Amendment would have been applicable regardless of the otherwise prurient and offensive character of the publications. Each court rejected any redeeming importance for the three works. The trial court found that each "has not the slightest redeeming social, artistic or literary importance or value" (R. 352–353), and the court of appeals rejected, for each publication, the particular redeeming qualities claimed for it (R. 389–391.) We note, in this connection, that the courts properly and explicitly considered not only social, scientific or intellectual importance, but artistic and literary importance as well.

The courts below thus apparently found, upon examination, that each publication was *wholly* devoid of redeeming value. This may have been, in reality, too strict a test. For just as pruriency and offensiveness must be judged in light of the work "as a whole," so, we believe, must the existence of redeeming importance. Petitioners contend that a publication or utterance falls without the First Amendment only if it is "totally devoid of value" (Pet. Br. 32). We submit, however, that if, for example, the conced-

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them in a package with other pictures not obscene"); *Flying Eagle Publications, Inc.* v. *United States*, 285 F. 2d 307, 308 (C.A. 1) ("[a]n obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details").

edly pornographic works which petitioners introduced as exhibits in this case each contained a single well turned phrase of literary merit, a sentence or two of social comment flowing from the bizarre situations described in the book, or a particular photograph or drawing of some artistic value, they would not therefore fall within the absolute protection of the First Amendment. Few works are so offensive and so flooded in every last line and detail with prurient appeal that no claim can be made that particular isolated segments also appeal to some other interest. The existence of redeeming importance must therefore be judged in view of the whole work, with regard to which particular details may become insignificant. In making this assessment, it would not be remiss to take into account the audience to which the utterance is obviously directed and distributed. The trial judge's discussion of *Eros* (R. 362–366) indicates that he followed this approach; in all events, whatever error was made in this regard below favored petitioners rather than the prosecution.[6]

[6] Petitioners' contentions (Pet. Br. 57–58) that essential elements were lacking from the findings of fact in respect to *Eros* and *Liaison* are insubstantial. Petitioners urge that the trial court failed to find "patent offensiveness" with regard to *Eros* and "prurient interest appeal" with regard to *Liaison*. Since a judgment of obscenity involves a characterization, there is only one essential finding—that material is, or is not, obscene. Subsidiary findings regarding the existence of the elements of the test for obscenity are certainly useful upon review in judging whether the proper test was invoked but, as we have shown in the text, there is no question here that both courts below understood and properly defined all the elements of the relevant *Roth* standard. Any failure to verbalize findings regarding particular elements of the test with respect to *Eros* and *Liaison* there-

Petitioners appear to argue (Pet. Br. 40–56) that, in light of the record made in the trial court, the findings of obscenity below should be reversed as being without evidentiary support. As petitioners note, opinion evidence was indeed offered by petitioners' witnesses to show that the works here did

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fore do not cast doubt upon the courts' proper understanding of *Roth;* nor do they infect the validity of the convictions in light of the presence of the ultimate finding of obscenity as to each publication.

We submit, moreover, that, fairly read, the findings below cover each relevant element of obscenity with regard to each publication. The trial judge found that *Liaison* "primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest" and that it "treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitous manner and creates a sense of shock, disgust and shame in the average adult reader" (R. 352–353). It would call for a peculiarly narrow view of these observations to conclude that the judge found merely that *Liaison* had the "purpose" to appeal to prurient interest, but did not have such appeal itself. As to *Eros*, the judge concededly did not indicate in his conclusory findings that he found it to be offensive in light of community standards. In his opinion, however, he mentioned a number of items, constituting the dominant parts of the whole, in which "one has little difficulty in finding all of the requisite elements of obscenity," specifically describing one segment as consisting "of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior," and another as constituting "a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination" (R. 364). It is thus clear that he found these items sufficiently offensive. Since he found that the dominant tone of the magazine flowed from them (R. 362–363), a finding of offensiveness is properly inferred, (1) in light of his ultimate conclusion of obscenity, and (2) in light of his obvious understanding that that ultimate conclusion required a determination that the material went beyond customary limits of candor (R. 360).

not dominantly appeal to prurient interest, did not go substantially beyond contemporary standards of candor, and that they had significant redeeming social importance. However, as the courts below held, the ultimate determination of obscenity must be made by courts in light of an independent examination of the materials in issue and not by expert witnesses. Cf. *United States* v. *Kennerly,* 209 Fed. 119, 121 (S.D. N.Y.). With regard to community standards, the most that has ever been claimed is that a defendant has a right to "enlighten" the trier of facts. See *Smith* v. *California,* 361 U.S. 147, 165 (Frankfurter, J., concurring), 172 (Harlan, J., concurring). The trier is obviously not bound by the particular evidence offered. See *Kahm* v. *United States,* 300 F. 2d 78 (C.A. 5), certiorari denied, 369 U.S. 859. Similarly, the introduction of opinion testimony cannot establish conclusively that a work has redeeming importance or that it does not have prurient appeal. After considering both the testimony and the works themselves, the courts below rejected petitioners' opinion evidence on the issues determining obscenity; this rejection was properly within the trial court's authority and was not reversible error.[7]

Finally, petitioners argue for a different verbalization of the test of obscenity from that used in *Roth* and in the courts below. In their view "only material properly classified as 'hard-core [pornography]' meets the standard of obscenity enunciated by this Court" (Pet. Br. 40). A mere change in labels would not,

[7] The rejection was made explicit with regard to the redeeming value of *The Handbook* (R. 352, 366, 390).

we think, make the underlying issues of policy more malleable (*Jacobellis* v. *Ohio, supra,* 378 U.S. at 201 (Warren, C.J., dissenting)), and a "hard-core pornography" test would most likely be nothing more than such a change in verbal characterization. For example, *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, holds that only "hard-core pornography" can be constitutionally reached by obscenity statutes (383 P. 2d at 160–162) but, as it defines the term, all material that is obscene under the *Roth* test would also meet the definition of hard-core pornography (id. at 163). In this case, moreover, the trial judge, in addition to finding that all three works satisfied the *Roth* standard, simultaneously found two of them to be "hard-core." As to the dominant material in *Eros,* he found that "[t]here is no notable distinction between the aforesaid * * * and the admittedly obscene ["hard-core"] material which was in evidence for comparison purposes" (R. 364); as to *The Handbook,* he specifically found it to be "a perfect example of hard-core pornography (R. 367).

Insofar as a hard-core pornography test would limit, rather than merely re-characterize, the concept of obscenity, petitioners appear to suggest that it applies to only a special class of erotic works having certain themes developed in a unique way to achieve a particular psychological effect, *i.e.,* works showing "a succession of increasingly erotic scenes [of certain specified types] without distracting non-erotic passages * * * all described in taboo words." (See Pet. Br. 38 n. 17.) Such a limited psychological concept, however, would not seem adequately to reflect society's

legitimate interest in prohibiting classes of lewd, vulgar or filthy works of no redeeming value not falling within this special psychological category—scatological or purely sadistic materials, for example, or vulgar erotic materials without the progressive build-up of erotic tension which petitioners deem vital. Moreover, petitioners' suggested concept admittedly has no general utility as applied to visual rather than verbal utterances.

There is, in sum, no reason to substitute a new "hard-core" standard of uncertain content for the *Roth* test, which incorporates the definition refined over many years in judicial decisions and incorporated in the Model Penal Code. We rest therefore on the proposition that the courts below applied the *Roth* standard in determining obscenity in this case. Their opinions below show scrupulous adherence to the *Roth* definition and petitioners point to no specific definitional error affecting their convictions. The remaining questions concern the correctness of the application of that standard to the three specific materials here in issue.

III

THE FINDINGS OF OBSCENITY BELOW WERE PERMISSIBLY BASED UPON A REASONABLE CHARACTERIZATION OF THE MATERIALS IN ISSUE

Whether the materials involved in particular litigation contain sufficient elements of pruriency and offensiveness—while lacking redeeming importance—to come within the constitutional application of 18 U.S.C. 1461, is a question of ultimate judgment upon which no amount of argumentation can substitute for an examination of the materials themselves. If the Court deems such an examination appropriate in this case,

we recognize that it will form the principal basis for decision here. We are also aware that, in undertaking such an examination, the Court may deem itself free to come to a constitutional judgment upon the question of obscenity independent of that made by the courts below. See the opinions of Mr. Justice Harlan in *Roth* v. *United States,* 354 U.S. at 498, and of Mr. Justice Brennan in *Jacobellis* v. *Ohio,* 378 U.S. at 190. Nor do we urge in this case that there is no rational basis upon which this Court could find some of these materials not to be obscene. The legal characterizations of *Eros* and *The Handbook* appear to us, in particular, to involve legitimate room for argument, although we believe that the obscenity of *Liaison* appears with considerable clarity. For these reasons, we shall direct our argument (see *infra,* pp. 29–34) on this aspect of the case to an enumeration of the factors that, in our view, affirmatively support the findings of obscenity below.

While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the *Roth* test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of pruriency and offensiveness to the reasonable judgment of the courts below. In terms of vindicating the affirmative values of the First Amendment, the issue of redeeming importance is of crucial concern: Obscenity legislation must not be used to cut off the legitimate flow and

interchange of ideas and artistic expression, and this Court is appropriately the ultimate guardian of such communications. Once the Court has assured itself, however, that the federal statutes have not been used in a particular case to inhibit communications with an affirmative claim to the protections of speech or press, we submit that the remaining questions—whether the particular materials involved are sufficiently prurient and offensive—might appropriately be left to the reasonably based judgments of the lower courts. Pruriency and offensiveness are not constitutional absolutes, as is the presence of redeeming importance; they must be judged somewhat subjectively in the light of the degree of the probable impact of the materials and in light of the degree of their deviation from the shifting standards of taste and candor present in the national community. The Court may well feel that it is not in an especially advantageous position to exercise a fully independent judgment regarding these factors. We believe, moreover, that the consequences of possible error in making the evaluation of offensive or prurient appeal in particular cases—so long as the materials can reasonably be characterized as obscene—is not of important constitutional significance if the material involved has, indeed, no redeeming importance affirmatively calling for its protection under the First Amendment.

The most important issue, in short, is whether governmental power has been used to regulate the market place of ideas or to suppress authentic artistic expression. This is a judgment which can normally be made without delicate psychological and sociological

analysis, and it is one upon which this Court's independent view seems most appropriate.

We turn now to an enumeration of the factors which, in our view, reasonably support the conclusions of obscenity reached by the courts below as to each publication in issue.

1. *Liaison.*—Substantial portions—and perhaps all—of *Liaison* consists of dirty jokes and vulgar and smutty accounts of sexual topics with no evident purpose other than to appeal to prurient interest. For example although the introductory statement asserts that "[w]e will not carry any salacious material," the next line gratuitously sets forth three obscene four-letter words as examples of what will not be sanctioned in the publication, and the paragraph concludes with an additional gratuitous obscenity. Pages 4–5 contain a smutty article on the possible nutritive value of a form of sodomy, called "Semen in the Diet," and pages 5–6 are a collection of dirty jokes and rhymes. In light of this material, the decision of courts below that *Liaison* substantially constituted an offensive appeal to prurient interest was soundly based. Indeed, one of petitioners' own witnesses—an expert on mass culture—testified that *Liaison* was "an extremely tasteless, vulgar and repulsive issue" and that he considered it "not a particularly interesting book. It has no literary value, I would say" (R. 236–237).

Petitioners suggest that *Liaison* is not obscene because it is not "erotically stimulating" and because one article, "Slaying the Sex Dragon," by Dr. Albert Ellis (occupying 2½ pages out of an issue of 6 pages)

has redeeming importance (Pet. Br. 54-56). (Petitioners appear to concede that the remainder of *Liaison* has no such importance.) We submit, however, that vulgar sexual material need not be dominantly erotic to be prurient: its prurience may lie not only in its erotic stimulation but in its appeal to "a shameful or morbid interest in nudity, sex, or excretion * * * if it goes substantially beyond customary limits of candor in description or representation of such matters * * *" (A.L.I. Model Penal Code, § 207.10(2), Tentative Draft No. 6, 1956, cited approvingly in *Roth,* 354 U.S. at 487 n. 20). As to the article by Dr. Ellis, we agree that, standing alone, it may constitute a non-obscene "espousal of freedom of sexual conduct" (Pet. Br. 54). It was not, however, published alone and its presense does not privilege a publication otherwise composed of obscene material which has no integral relationship to the redeeming feature. A group of pornographic photographs, for example, surely does not become privileged because published interspersed with some nude photographs of artistic value.

In sum, substantial portions of *Liaison* are composed of offensive matter concededly of no redeeming importance; the judgment of the district court that it was "dirt for dirt's sake" (R. 353) was clearly a reasonable characterization. The convictions as to *Liaison* may be affirmed on this basis despite the presense, *arguendo,* of redeeming non-obscene material which would have been protected by the First Amendment if published alone.

2. *Eros.*—The judgments as to *Eros* rest upon four articles found to be obscene by the trial judge (R. 363–364). As we have said, *supra,* pp. 19–20, and in our discussion of *Liaison,* we believe that in a publication, like *Eros,* which is a composite of independent works tied together only by the fact that they all treat sex in some manner, a judgment of obscenity as to the whole may thus be based upon some of its parts—so long as they are significant in light of the whole. There is no danger that material of some value will thereby be suppressed, since it may freely be published alone and it loses nothing by being severed from obscene material with which it has no integral relationship. The opposite rule would, on the other hand, privilege obscene material merely because of its physical connection with non-obscene material.

Decision as to *Eros* therefore rests upon the obscenity of the four articles noted by the trial judge (since they clearly constitute a significant portion of the whole magazine). These are *The Natural Superiority of Women as Eroticists* (*Eros,* pp. 65–67); excerpts from *My Life and Loves,* by Frank Harris (*Eros,* pp. 39–48); *Black & White in Color* (*Eros,* pp. 72–80); and *Bawdy Limericks* (*Eros,* pp. 60–64). We believe that the judgments below that these four articles are prurient and offensive, and lacking in redeeming importance, are reasonably supportable. *The Natural Superiority of Women* contains highly erotic material of great sexual explicitness excerpted from two books and reproduced in bold-faced type. The connecting commentary, in ordinary type, is ex-

tremely brief and the Court may deem it of insignificant redeeming importance upon an independent examination. The excerpts from Frank Harris' extensive autobiography, *My Life and Loves,* are almost entirely of explicit sexual accounts contained in the total work. While these erotic passages may have value as integrated into the whole work, such passages, we believe, may lose their redeeming importance when set forth out of context as isolated sexual descriptions. The prurient and potentially offensive elements of *Bawdy Limericks* and *Black & White in Color* (containing photographs of a nude man and woman in amorous poses) also seem apparent. Their obscenity, we believe, turns upon whether, upon an independent examination, the Court finds them to contain redeeming artistic or literary value which would place them within the protection of the First Amendment. Finally we note that, as to *Eros,* its presentation seems to show a conscious attempt to approach as close to the borderline of obscenity as possible, an element which may, we submit, be deemed determinative in an otherwise doubtful case.

3. *The Handbook.*—We think there is little doubt that, as the trial judge found, *The Handbook* is "a vivid, explicit and detailed account of a woman's sexual experiences from age three to age thirty-six years" (R. 351–352), with the descriptions leaving "nothing to the imagination" (R. 366–367). For some examples of its content in this regard, see *The Handbook,* pp. 45–46, 77–78, 140–141, 167–168 and 207. This and similar material, which pervades the book, constitutes a reasonable foundation for the conclusion

below that *The Handbook* contains the requisite dominant elements of pruriency and offensiveness, if the Court also concludes that it has no redeeming social importance.

The importance of *The Handbook* is alleged by petitioners to be threefold: (1) its informative value as a true autobiographical account of sexual experiences, (2) the social comments upon sexual mores contained within the book, and (3) the book's utility in the treatment of psychological and medical problems (Pet. Br. 47–52). If *The Handbook* has such values, we recognize that it comes within the protection of the First Amendment, regardless of its otherwise prurient and offensive character, so long as the distribution of the book reflected the social values claimed for it. See the Chief Justice's opinion in *Roth,* 354 U.S. at 494. However, the trial judge rejected the testimony supporting the claim of social value, including the testimony of the authoress of the book (R. 352, 366), and the record does not show that the distribution of *The Handbook* by petitioners was limited to those who would use it in a clinical, educational or professional manner but, on the contrary, suggests that petitioners attempted to place it in general circulation among many persons to whom its asserted values would have been minimal. These facts provide a basis for a finding of lack of redeeming importance, but the Court's independent judgment can probably only be exercised after a fairly thorough examination of the book itself.

In sum, we find a clear rational basis for the findings below of pruriency and offensiveness as to each

work. In addition, the portions of *Liaison* which meet this test, in our view, are plainly without redeeming importance and bear no integral relationship with a single article in *Liaison* for which redeeming importance is claimed. The lack of redeeming importance of *Eros* and *The Handbook* is open to greater question, but here, too, there is basis for the findings below.

IV

NO PROCEDURAL ERRORS VITIATE THE CONVICTIONS

Petitioners assert several miscellaneous procedural errors (Pet. Br. 57–66) which may be disposed of briefly.

A. Petitioners' contention (Pet. Br. 60–61) that the judge indicated, by his opinion, that he relied upon *The Handbook's* purported effect on adolescents in determining its obscenity, is untenable. The case is unlike *Volanski* v. *United States,* 246 F. 2d 842 (C.A. 6), where psychiatric testimony concerning effects upon adolescents was apparently introduced as part of the government's case-in-chief and the trial judge's oral opinion clearly revealed that this testimony was instrumental in bringing him to his decision (*id.* at 843 and n. 1). Here, the testimony complained of was part of the Government's rebuttal case, intended only to counter petitioners' evidence and not to establish the obscenity of the materials. To the extent that the trial judge indicated any reliance at all upon the testimony, it was only by way of partial explanation of his rejection of petitioners' evidence, which, as his opinion demonstrates beyond doubt, would have been rejected

in any event. In actuality, the effect of *The Handbook* upon adolescents was "regretfully note[d] in passing" (R. 366); the judge's only other comment was that "[j]ust as [adolescents] cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community" (R. 368). There is nothing in these remarks which is inconsistent with the conclusion that the judge scrupulously adhered to the *Roth* test.

B. Petitioners' contention (Pet. Brief 58–60) that the trial judge erroneously imputed to all defendants an intent which could be assigned only to Eros Magazine, Inc. is also unpersuasive. The evidence of intent related to the action of the associate publisher of the magazine in attempting to obtain postmarks for its advertising material which would be suggestive of sexual activity. (The post offices involved were those at Blue Ball, Pa., Intercourse, Pa. and Middlesex, N.J.). Petitioners complain that there was "no evidence that petitioner Ginzburg knew of or directed" the attempt (*id.* at 58). However, Ginzburg's control over all of the corporate petitioners was evidenced by his stipulation that he knowingly caused to be mailed the materials named in the indictment, and by his signing the stipulation on behalf of each of the corporate petitioners (R. 150). Additionally, the testimony of the editor of *Liaison* indicated that Ginzburg kept close control over his various publishing endeavors (R. 173–183). It was thus fair to conclude that he knew and approved the attempt to obtain postmarks for *Eros*. The inference as to his intent in connection with *Eros* could properly be imputed to the

two other corporate petitioners in view of his simultaneous operation of their related activities. In any event, as the court of appeals noted (R. 392), the point is of slight moment since it was stipulated that all of the petitioners had knowledge of the content of the works here in issue and such knowledge is the principal basis for establishing *scienter* in an obscenity prosecution. See *Rosen* v. *United States*, 161 U.S. 29, 41–42; *Price* v. *United States*, 165 U.S. 311; *Roth* v. *United States*, 354 U.S. at 491 n. 28; *Kahm* v. *United States*, 300 F. 2d at 86; *United States* v. *Oakley*, 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368 U.S. 888.

C. Finally, as the court of appeals also noted (R. 391–392), petitioners' complaint (Pet. Br. 61–66) concerning the trial court's delay in making special findings requested by petitioners is without substance. The only "finding" that can be made in a case such as this is that the works are obscene under the relevant test. Having made this ultimate finding in its general verdict, the court was free to take some time to make explicit the particular basis of its general ruling. Rule 23(c) of the Federal Rules of Criminal Procedure [8] does not require the special findings to be made before or simultaneously with the general finding, and petitioners do not suggest that the trial judge was unaware of the facts or the proper *Roth* standard at the time of his general finding.

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[8] Rule 23(c) provides:

> In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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